No. 91-17

In the Supreme Court of the United States

OCTOBER TERM, 1991

ESTATE OF FLOYD COWART, PETITIONER

v.

NICKLOS DRILLING CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g), provides that the rights of a "person entitled to compensation" shall be terminated if the person settles a claim against a third person for less than the compensation payable under the LHWCA without obtaining his employer's prior written approval. The question presented is whether the termination-of-rights provision applies when the person who settles the claim without employer approval is not, at the time of the settlement, receiving compensation from his employer and has not been determined to be entitled to it.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. A) is reported at 927 F.2d 828. The panel opinion of the court of appeals (Pet. App. B) is reported at 907 F.2d 1552. The decision and order of the Benefits Review Board (Pet. App. C) is reported at 23 Ben. Rev. Bd. Serv. (MB) 42. The decision and order of the administrative law judge (ALJ) (Pet. App. D) is reported at 19 Ben. Rev. Bd. Serv. (MB) 457.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1991. The petition for a writ of certiorari was filed on June 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) requires employers to pay compensation to covered employees and their survivors for work-related injuries that result in disability or death, 33 U.S.C. 908, 909, and to provide medical services for covered injuries. 33 U.S.C. 907. A "person entitled to * * * compensation" under the LHWCA, however, may also recover damages from a third person. 33 U.S.C. 933(a). If the person does so recover, the employer receives a credit against the LHWCA compensation to the extent of the employee's "net" recovery against the third party (defined as the employee's actual recovery less his reasonable expenses including attorney's fees). See 33 U.S.C. 933(f).[1]

Section 33(g)(1) of the LHWCA provides a special rule for cases in which "the person entitled to compensation" settles the third-party action for less than the amount of compensation to which the person would be entitled under the LHWCA. 33 U.S.C. 933(g)(1). In such cases, the employer is liable for the difference between the settlement and the LHWCA compensation due "only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed." *Ibid.* In addition,

[1] The LHWCA also provides a mechanism for an employer that is required to pay compensation to assert the employee's third-party claim if the employee does not. If the employee accepts an award of compensation and does not assert the third-party claim within six months, the employer may, within 90 days thereafter, sue the third person on assignment of the employee's cause of action. 33 U.S.C. 933(b) and (d). From any recovery (net of attorney's fees and costs), the employer is entitled to recoup its payments to the employee and to retain the present value of estimated future compensation payments. See 33 U.S.C. 933(e).

> [i]f no written approval of the settlement is obtained and filed as required by [Section 33(g)(1)], or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under [the LHWCA] shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under [the LHWCA].

33 U.S.C. 933(g)(2).

2. On July 20, 1983, Floyd Cowart injured his hand while working on an oil drilling platform. Pet. App. B3, D5, D7.[2] His employer, Nicklos Drilling Co., through its insurer, Compass Insurance Co., paid him temporary total disability benefits from July 21, 1983, through May 21, 1984, when he was released to return to work. Pet. App. B3-B4, D7-D8. Nicklos did not pay Cowart for any permanent disability, however, despite Department of Labor notification that such payments were due. Pet. App. D8-D9.[3] On July 1, 1985, Cowart settled a tort suit against a third person (the owner of the platform) for $45,000, with prior notice to Nicklos but without its written consent. Pet. App. D9, D25. The net amount of the settlement was

[2] Because the platform was on the Outer Continental Shelf, the LHWCA governed his disability claim. See 43 U.S.C. 1333(b); Pet. App. D1-D2.

[3] Section 14(a) of the LHWCA, 33 U.S.C. 914(a), requires an employer to pay compensation promptly without an award. Section 14(e), 33 U.S.C. 914(e), creates an incentive for prompt payment by increasing an employer's liability by 10% if it does not pay or contest eligibility within 14 days of notice. If the employer contests or does not pay, the claimant may file a claim and, if successful, obtain a formal award. 33 U.S.C. 913, 919.

$29,350.60; the LHWCA compensation amount was $35,592.77. Pet. App. D9.

After settling, Cowart filed an administrative claim seeking the difference between the settlement amount and the compensation due under the LHWCA, as well as future medical benefits and interest. See Pet. App. B4, D26-D27. Nicklos stipulated that Cowart's hand was permanently partially disabled, *id.* at D6, but argued that Cowart's failure to obtain Nicklos's written consent to the settlement relieved Nicklos of its obligation to pay further compensation or medical benefits. *Id.* at D2-D3. Relying on Benefits Review Board precedents, the administrative law judge (ALJ) rejected that contention. The ALJ held that the employer's consent was not necessary since, at the time Cowart executed the settlement, he was not a "person entitled to compensation" under 33 U.S.C. 933 (g)(1) because he was not receiving benefits. Pet. App. D10-D25, citing *O'Leary* v. *Southeast Stevedoring Co.*, 7 Ben. Rev. Bd. Serv. (MB) 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980); *Dorsey* v. *Cooper Stevedoring Co.*, 18 Ben. Rev. Bd. Serv. (MB) 25 (1986), appeal dismissed, 826 F.2d 1011 (11th Cir. 1987).

The Benefits Review Board affirmed. Pet. App. C1-C26. It stated that prior to the 1984 amendments to the LHWCA,[4] the Board had ruled that "a claimant was a 'person entitled to compensation' within the meaning of Section 33(g)" only "if [the] employer was paying benefits either voluntarily or pursuant to an award at the time of the third party settlement." Pet. App. C15. If the claimant "was not receiving benefits," the Board stated, the prior approval requirement of Section 33(g) "did not apply." Pet. App. C15. The Board reaffirmed its view that the LHWCA as amended in 1984 continued to carry the same meaning, reasoning that such a construction is necessary to give effect to all parts of the statute and, moreover, is sufficient to protect an employer's lien interest in a third-party recovery under Section 33(f), 33 U.S.C. 933(f).[5] Pet. App. C15-C17.

[4] See Pub. L. No. 98-426, § 21(d), 98 Stat. 1652 (1984), adding Section 33(g)(2), quoted at page 3, *supra*.

3. A panel of the court of appeals vacated the Board's decision and order. Pet. App. B1-B9. The court stated that under Section 33(g)(1), there are no exceptions to the "unqualified" requirement that an employer is liable for compensation only if the employer and its carrier had given written approval to the third-party settlement. Pet. App. B8-B9. Thus, "future LHWCA benefits must be denied an employee who fails to obtain prior consent by his employer/carrier to the settlement of his claim against a third party tortfeaser." Pet. App. B2-B3.

4. To resolve a conflict with the court's earlier unpublished decision in *Kahny* v *Director, OWCP*, 729 F.2d 777 (5th Cir. 1984) (Table), the court of appeals granted suggestions for rehearing en banc filed by the Director, Office of Workers' Compensation Programs [6] and petitioner, and affirmed the panel de-

[5] As construed by the courts, Section 33(f) allows the employer a lien on the claimant's net tort recovery so that the employer can recoup compensation already paid. See *Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 80-81 & n.6 (1980); *Ochoa* v. *Employers National Ins. Co.*, 754 F.2d 1196 (5th Cir. 1985).

[6] Under Section 39(a) of the LHWCA, "the Secretary [of Labor] shall administer the provisions of this chapter." 33 U.S.C. 939(a). The Secretary has assigned that administrative responsibility to the Director. 20 C.F.R. 802.410(b). See *Director, OWCP* v. *Perini North River Associates*, 459

cision. Pet. App. A4, A20.[7] Applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court held that Section 33(g) unambiguously requires an employer's prior written approval of settlements for less than the compensation due, whether or not a claimant is receiving LHWCA compensation at the time of settlement. The court therefore refused to defer to the Director's contrary interpretation. Pet. App. A12-A16.

For three reasons, the court rejected the Director's argument that "[t]he actual payment of benefits * * * is the price which Congress intended employers to pay for the right of prior approval." Pet. App. A9. First, the court found no textual exceptions to the approval requirement set forth in Section 33. Pet. App. A16-A17. Second, the court pointed out that Section 33(g)(2) terminates benefits for noncompliance "regardless of whether the employer * * * has made payments or acknowledged entitlement to benefits under this subchapter," 33 U.S.C. 933(g)(2); that provision, the court stated, "squarely refutes" the Director's argument that the employer's actual payment of benefits was intended to be the *quid pro quo* for the employer's right of prior approval. Pet. App. A17. Finally, the court saw no need to accept the Director's reading of Section 33(g) in order to

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U.S. 297, 302 n.9 (1983). The Director participated as a respondent in the court of appeals.

[7] The court also granted rehearing en banc in a companion case raising the same issue, *Petroleum Helicopters, Inc.* v. *Barger*, 910 F.2d 276 (5th Cir. 1990), and similarly affirmed the decision vacating the Board's order. See Pet. App. A7, A20. The claimant's petition for certiorari in that case is pending as *Barger* v. *Petroleum Helicopters, Inc.*, No. 91-284.

prevent financial hardship to claimants pursuing civil remedies. Any hardship on claimants, the court indicated, was a "self-inflicted" result of their decision "to ignore their rights and responsibilities" under 33 U.S.C. 933(g). Pet. App. A18.

The court also rejected the Director's claim that his construction is necessary to give meaning to the requirement in Section 33(g)(2) that "employee[s]" must notify their employers of "any settlement obtained from or judgment rendered against a third person." 33 U.S.C. 933(g)(2). The Director argued that if the approval requirement were applied to all settling claimants, including those who were not receiving benefits, the notice provision would be superfluous because the employer would be aware of all settlements from having approved them.[8] The court, however, stated that the quoted phrase in Section 33(g)(2) not only "extends the notification requirement to judgments," but also applies to settlements "for an amount exceeding [a claimant's] LHWCA compensation entitlement." The approval requirement, in contrast, applies only to settlements for less than a claimant's LHWCA compensation entitlement. Thus, the court did not believe that its interpretation rendered the notice requirement superfluous. Pet. App. A18-A19.

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[8] The Director argued (C.A. Supp. Br. 19) that Section 33(g) distinguishes between two kinds of settlements for less than the amount of LHWCA compensation: those where a claimant was receiving benefits at the time of settlement and those where he was not. According to the Director, the former class, constituting "person[s] entitled to compensation," is governed by Section 33(g)(1)'s approval requirement; the latter is governed by Section 33(g)(2)'s notification requirement.

Finding that "Congress has spoken unambiguously" in requiring all employees to obtain prior approval, the court concluded that the Director's interpretation of the statute was not entitled to deference. Pet. App. A20.

Three judges dissented. Pet. App. A20-A27. They found the Director's interpretation of "person entitled to compensation" reasonable and entitled to deference. In particular, the dissent saw no valid reason why an employee who has been denied compensation must "go hat in hand to the employer and request permission to settle his claim," Pet. App. A24; such a result would serve only to foreclose a legitimate compensation claim. Pet. App. A25-A26. The dissent also found no evidence that Congress intended to overrule the Director's interpretation when it added Section 33(g)(2) in the 1984 LHWCA amendments; rather, the dissent interpreted Congress's reenactment of the phrase "person entitled to compensation" as approval of the administrative and judicial construction, and agreed with the Director that Section 33(g)(2)'s notification requirement "adds to the force of the Director's construction" by requiring notification but not approval whether compensation is being paid or not. Pet. App. A26-A27.

ARGUMENT

Petitioner contends (Pet. 11-52) that the court of appeals erred in holding that Section 33(g) of the LHWCA requires an employer's written approval of all third-party settlements for less than the compensation due, even when the employee is not receiving LHWCA compensation at the time of settlement. The court concluded that the plain language of Section 33(g) dictates that result, and therefore declined to defer to the position asserted by the Director, supported by a line of Benefits Review Board decisions, that a "person entitled to compensation" is a person actually receiving LHWCA benefits at the time of a settlement.

The competing interpretations of Section 33(g) advanced by the Director and the court of appeals may warrant this Court's attention in an appropriate case. In our view, however, the issue is not ripe for review at this time. The Fifth Circuit is the only court of appeals to have issued a published appellate decision addressing the issue, and there is, accordingly, no conflict in the circuits. Nor is there any decision of this Court that addresses the issue. In light of the dearth of reported decisions considering this issue, review by this Court would be premature.[9]

We do not agree with petitioner's claim (Pet. 52-53) that the court of appeals' decision conflicts with *Bethlehem Steel Corp.* v. *Mobley*, 920 F.2d 558 (9th Cir. 1990). There, the court held that the employer's approval of a settlement was not required because the claimant "did not enter into a settlement for 'less

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[9] The Director has informed us that the issue is pending before the Ninth Circuit. See *Cretan* v. *Bethlehem Steel Corp.*, 24 Ben. Rev. Bd. Serv. (MB) 35 (1990), petitions for review pending, Nos. 90-70589 & 90-70634.

than the compensation' to which he was actually entitled." *Id.* at 560. The court expressly declined to "address the Board's alternative holding that * * * prior approval is required only when the settlement is reached after the employee has begun receiving compensation from the employer," *id.* at 560 n.3—the issue presented here.[10] Nor is there a conflict based on *O'Leary* v. *Southeast Stevedoring Co.*, 7 Ben. Rev. Bd. Serv. (MB) 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980). The Ninth Circuit's unpublished affirmance in *O'Leary* has no precedential force in that circuit. See 9th Cir. R. 36-3.[11] In any event, *O'Leary* was decided before Congress amended the LHWCA in 1984 to impose the notice requirement on settling employees and to make the forfeiture-of-benefits rule applicable "regardless of whether the employer * * * has made payments or acknowledged entitlement to benefits under this [chapter]." See Pub. L. No. 98-426, § 21(d), 98 Stat. 1652 (1984), adding 33 U.S.C. 933(g)(2). At most, therefore, *O'Leary* applies only to the earlier

[10] The court in *Mobley* went on to hold that an employee does not have to notify an employer of a settlement as soon as it is entered, stating that "[s]o long as the employer has notice of the settlement before it has made any payments and before the Agency orders it to make any payments, the purposes of the statute are satisfied." 920 F.2d at 561. Because that statement addresses the *time* for notification under Section 33(g)(2), and not the meaning of "person entitled to compensation" under Section 33(g)(1), petitioner errs (Pet. 52-53) in relying on it.

[11] Indeed, when the Ninth Circuit in *Mobley* stated that it was not addressing the issue raised in this case, it referred only to the Board's decision in *O'Leary*, not to its own (unpublished) decision. 920 F.2d at 560 n.3.

version of Section 33(g), not to the amended LHWCA at issue in this case.

Nor is it clear that the impact of the Fifth Circuit's decision on claimants is so great that review is required at this time. To be sure, the Director informs us that the Fifth Circuit's decision generally would make it more difficult for claimants to pursue both tort remedies and LHWCA compensation. There are likely to be situations where injured workers receive no compensation while they are pursuing tort damages, and then are presented with proposed settlements in third-party actions for less than their potential compensation. Employers may, for a variety of reasons, withhold approval of such settlements. The claimant then has a Hobson's choice of either accepting an immediate settlement and forfeiting any LHWCA rights or foregoing any monetary relief for years.

But the potentially harsh consequences of the decision are tempered by several factors. First, claimants who have a disease but are not yet disabled may be able to settle third-party suits without employer approval, even under the Fifth Circuit's interpretation of the statute. See Pet. 60. As the court reasoned in *Mobley*, 920 F.2d at 560, such settlements would not be for " 'less than the compensation' to which [the claimant] was actually entitled," and would therefore not be subject to the approval requirement, since an employee who is not yet disabled is not entitled to compensation. See also *Jones* v. *St. John Stevedoring Co.*, 18 Ben. Rev. Bd. Serv. (MB) 68, 72 (1986), aff'd in part and rev'd in part on other grounds *sub nom. St. John Stevedoring Co.* v. *Wilfred*, 818 F.2d 397, 400 (5th Cir.), cert. denied, 484 U.S. 976 (1987).

Second, it is not clear to what extent the Fifth Circuit's decision will require dismissal of the LHWCA claims of employees who have settled third-party actions but have not yet received compensation. As petitioner notes, one Fifth Circuit employer has moved to dismiss more than 3,000 pending deficiency claims. Pet. 56. But in some of these cases, as in *Barger* v. *Petroleum Helicopters, Inc.*, petition for cert. pending, No. 91-284, it will likely be disputed whether the disposition of a third-party suit was a settlement, see 91-284 Pet. App. 66a-67a, 70a n.2, for an amount less than the LHWCA compensation,[12] and was otherwise subject to Section 33's approval requirements. Cf. *United Brands Co.* v. *Melton*, 594 F.2d 1068, 1073-1074 (5th Cir. 1979). These factual questions will have to be determined on a case-by-case basis.

Finally, it is unlikely that employers will succeed in obtaining reimbursement from claimants who already have received compensation after settling third-party actions without an employer's consent. See Pet. 54-55. In cases that have already been adjudicated, res judicata would likely bar employers from raising this argument. See *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439, 2446 (1991) (opinion of Souter, J.); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 122-123 (1988); *Downs* v. *Director, OWCP*, 803 F.2d 193, 199 n.13 (5th Cir. 1986). In other pending cases, the Director construes the LHWCA to prohibit the recovery of overpaid compensation except by an offset against future, unpaid compensation that is

[12] In the instant case, for example, the Director argued below that petitioner had not settled his third-party suit for an amount less than his LHWCA compensation because the full settlement was for more than this compensation even though the net settlement was for less. See 33 U.S.C. 933(f). The court of appeals did not address this argument, and petitioner has not raised it in his petition.

not yet due. See 33 U.S.C. 908(j), 914(j), 922 (all allowing such future offsets but no other methods of recovery).[13] See also *Travelers Ins. Co.* v. *Haden*, 418 A.2d 1078, 1082-1084 (D.C. App. 1980) (finding no authority for reimbursement under pre-1984 version of Section 33(g)).

In view of these mitigating factors with respect to the decision's practical impact, and the absence of any circuit conflict, we do not believe that review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13] Whether the LHWCA allows reimbursement other than by offset is pending in *Stevedoring Services of America, Inc.* v. *Eggert*, No. 90-35015 (9th Cir.); *Pacific Marine Ins. Co.* v. *Director, OWCP*, No. 91-70017 (9th Cir.); and *Ceres Gulf* v. *Cooper*, No. 91-2097 (5th Cir.). See also *Bethlehem Shipbuilding Corp.* v. *Cardillo*, 102 F.2d 299, 302 (1st Cir.) (construing 33 U.S.C. 922 to mean that "the insurer in no case receives back any compensation previously paid but may have prior excess payments credited or allowed upon a present award"), cert. denied, 307 U.S. 645 (1939).

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